U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8865941

Date: AUG. 12, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as an HIL and MBD senior engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish eligibility for the benefit sought. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will withdraw the Director's decision and remand the matter to the Director for further consideration and entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] See section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. See section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is November 15, 2017. See 8 C.F.R. § 204.5(d).

II. THE DIRECTOR'S DECISION

The Director indicated in his denial decision that the Petitioner failed to submit certified copies of its federal tax returns in response to a request for evidence (RFE), and he concluded that the Petitioner did not establish eligibility for the benefit sought. The Director did not specifically determine that the denial was based on the Petitioner's inability to pay the proffered wage, yet the Director's request for certified tax returns appears to be tied to the ability to pay requirement in 8 C.F.R. § 204.5(g)(2). As noted by the Petitioner on appeal, the regulation at 8 C.F.R. § 204.5(g)(2) does not require the submission of certified tax returns. Here, the Director did not articulate a specific justification for requiring the Petitioner's certified tax returns, and he did not convey how the Petitioner failed to establish eligibility for the benefit sought. Therefore, we will withdraw the Director's decision. However, for the reasons discussed below, we will remand the matter to the Director.

III. ABILITY TO PAY THE PROFFERED WAGE

The Petitioner must establish its continuing ability to pay the proffered wage from the petition's priority date of November 15, 2017, onward. The proffered wage is $74,381 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[2]

In this case, the Petitioner submitted paychecks demonstrating that it employed the Beneficiary in 2017 and 2018. The paychecks reflect that the Petitioner paid the Beneficiary $71,666.64 in 2017, and $54,933.36 through August 31, 2018. The amounts on the paychecks do not equal or exceed the annual proffered wage. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid to the Beneficiary. The Petitioner must demonstrate its ability to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary, which is $2,714.36 in 2017 and $19,447.64 in 2018.

[2] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. See, e.g., River St. Donuts, LLC v. Napolitano, 558 F.3d 111, 118 (1st Cir. 2009); Tongatapu Woodcraft Haw., Ltd. v. Feldman, 736 F.2d 1305, 1309 (9th Cir. 1984); Estrada-Hernandez v. Holder, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); Rizvi v. Dep't of Homeland Sec., 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), aff'd, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

The Petitioner is a limited liability company (LLC) taxed as a partnership. The Petitioner's federal tax returns state net income[3] amounts as follows:

- $212,947 in 2017; and
- $1,805,260 in 2018.

Therefore, for the years 2017 and 2018, the Petitioner had sufficient net income to pay the difference between the proffered wage and the wages it paid to the Beneficiary.

However, where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. See 8 C.F.R. § 204.5(g)(2); see also Patel v. Johnson, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner filed multiple Form I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[4] We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.[5] The record does not contain information about the other beneficiaries. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of

[3] For a partnership, where the partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the Petitioner's IRS Form 1065, U.S. Return of Partnership Income. However, where the Petitioner has income, credits, deductions, or other adjustments from sources other than a trade or business, net income is found on page 5 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Internal Revenue Serv., Instructions for Form 1065, https://www.irs.gov/pub/irs-pdf/i1065.pdf (last visited Apr. 23, 2020). In this case, the Petitioner's net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its Form 1065.

[4] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[5] It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Skirball Cultural Ctr., 25 I&N Dec. 799, 806 (AAO 2012).

its applicable beneficiaries.[6] Thus, we cannot affirmatively find that the Petitioner established its ability to pay the combined proffered wages of all of its applicable beneficiaries. On remand, the Director should request additional evidence of the Petitioner's ability to pay and allow the Petitioner reasonable time to respond.

IV. THE BENEFICIARY'S EXPERIENCE

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12); Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification requires a master's degree and 24 months of experience as a HIL & MBD senior engineer or related, or a bachelor's degree and five years of experience. Foreign equivalent education is acceptable. Part H.14. of the labor certification also requires several special skills that are required for the offered job. The Beneficiary's highest level of education is a foreign equivalent bachelor's degree and, therefore, the Petitioner must establish that the Beneficiary possessed the required five years of experience as of the priority date.

The labor certification states that the Beneficiary qualifies for the offered position based on experience as an embedded software engineer with the Petitioner at its office in [redacted] Michigan from April 25, 2016, to the date the labor certification was filed in November 2017;[7] and as a senior project engineer with [redacted] in [redacted] India, from December 1, 2011, to December 31, 2015.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1). The record contains an experience letter from the Director of [redacted] stating that it employed the Beneficiary as a full-time senior project engineer from December 1, 2011, to December 31, 2015. The letter also lists his duties. However, information provided on the Beneficiary's nonimmigrant visa application submitted in August 2015 conflicts with the information provided on the labor certification in this case. The Beneficiary indicated on his nonimmigrant visa application that he was presently employed by [redacted] in India and that his engineering job there involved commercial and industrial electrical product installations. The Beneficiary also indicated on his application that he had no previous employers.[8] He did not disclose his purported employment with [redacted] on his nonimmigrant visa application, and he did not list his purported employment with [redacted] on the

[6] We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. See Matter of Sonegawa, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

[7] In response to the RFE, the Petitioner provided evidence indicating that the Beneficiary was performing services for a third-party client in [redacted] Michigan, and not at the Petitioner's office in [redacted] Michigan as certified on the labor certification. Thus, the location where he worked is unclear. Inconsistencies in the record must be resolved with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

[8] He signed the application and certified that its contents were correct and that any false or misleading statement may result in the permanent refusal of a visa or denial of entry in the United States.

labor certification.[9] Inconsistencies in the record must be resolved with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. Id.

The record also contains a letter dated August 25, 2018, stating that the Beneficiary has been employed by the Petitioner as an embedded software engineer since April 25, 2016. The letter asserts that the position of embedded software engineer is substantially different from the offered position of HIL and MBD senior engineer and details the duties and percentages of time devoted to the duties in each position.[10] However, the letter does not appear to have been written or signed by the Petitioner. See 8 C.F.R. § 204.5(g)(1). Instead, the letter includes a copy of a signature page from [redacted] Director of Engineering, on the Petitioner's letterhead that does not match the style or format of the body of the letter and appears to have been added separately. Discrepancies in the record must be resolved with independent, objective evidence. Id. On remand, the Director should request independent, objective evidence of the Beneficiary's experience resolving the inconsistencies and discrepancies in the record and allow the Petitioner reasonable time to respond.

V. ADVANCED DEGREE PROFESSIONAL

The Petitioner requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Thus, it must establish the Beneficiary's possession of an "advanced degree." 8 C.F.R. § 204.5(k)(1). This term means "[a]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." 8 C.F.R. § 204.5(k)(2). Based on the unresolved inconsistencies and discrepancies noted above regarding the Beneficiary's experience, it is not clear that the Beneficiary possesses at least five years of progressive experience in the specialty following his bachelor's degree. Thus, on remand, the Director shall also clarify whether the Beneficiary is an advanced degree professional under section 203(b)(2) of the Act.

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[9] Any foreign person who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the Act is inadmissible. See section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). A finding of willful and material misrepresentation in visa petition proceedings requires a determination: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and, 3) that the fact misrepresented was material. See Matter of M-, 6 I&N Dec. 149 (BIA 1954); Matter of L-L-, 9 I&N Dec. 324 (BIA 1961); Matter of Kai Hing Hui, 15 I&N Dec. 288 (BIA 1975). The regulation at 20 C.F.R. § 656.30(d) provides for invalidation of a labor certification upon a determination of willful misrepresentation of a material fact involving the labor certification application.

[10] A labor certification employer cannot rely on experience that a foreign national gained with it, unless the experience was in a job substantially different than the offered position or the employer demonstrates the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). A job is substantially different from an offered position if it requires performance of the same job duties less than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii).

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.